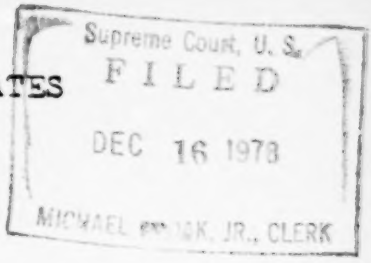
IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1978



NO. ~~78~~ -975

LEONARD M. POSEY, JR.
PETITIONER

v.

THE STATE OF SOUTH CAROLINA
RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

KENNETH E. SOWELL
500 PETTIGRU STREET
GREENVILLE, SOUTH CAROLINA
29601
TELEPHONE 803-242-4171
ATTORNEY FOR THE PETITIONER

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-vs-

THE STATE OF SOUTH CAROLINA
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PETITION

Leonard M. Posey, Jr., Petitioner herein, respectfully represents to the Court that he was convicted of the crime of manslaughter in the Court of General Sessions of Greenville County, South Carolina and has been sentenced to serve a term of Thirty Years. His conviction was affirmed by the Supreme Court of South Carolina on September 5, 1978. Petitioner's timely Motion for a Rehearing was denied by the South Carolina Supreme Court on October 2, 1978.

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of South Carolina affirming Petitioner's conviction and sentence.

OPINIONS BELOW

The opinion of the South Carolina Supreme

Court entered September 5, 1978 is unreported at this time and is reproduced herein as Appendix A. The Opinion of the South Carolina Supreme Court wherein the Petition for Rehearing was denied is unreported at this time and is reproduced herein as Appendix B.

JURISDICTION

The final order of the Supreme Court of South Carolina denying Petitioner's Appeal was entered October 2, 1978. This Petition is filed within the time required and jurisdiction of this court is founded upon 28 USC Sec 1257 (3) (1970), the Petitioner having asserted below and in this court a denial of rights secured to him by the Constitution of the United States.

QUESTIONS PRESENTED

NECESSITY OF RAISING AND RESERVING QUESTIONS IN THE LOWER COURT AND THE PLAIN ERROR RULE

Whether in a case involving in excess of twenty-three insulting or ridiculing comments concerning the defendant and attorney for the defendant, must the defense attorney make objection to such comments, and thus additionally anger the trial judge in order to retain

the right to raise such issue on appeal, or does the Due Process Clause of the Fourteenth Amendment to the United States Constitution allow the defense attorney to preserve such issue on appeal not withstanding the fact that no objection was raised during the trial stage.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves certain provisions of the Fourteenth Amendment to the Constitution of the United States, which in pertinent part provides:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 3, 1975 the Petitioner arrived at the home, or residence which he contended was his home, in the early morning hours. (There was some question whether he lived there or if his wife lived there alone.) At that time in bed with the Petitioner's wife was one Jack Woods. The Petitioner did hit the paramour with a stick or club, thereby

killing him.

The Petitioner raised the defense of self defense, claiming that at the time that the fatal blow was delivered, Jack Woods was reaching for a gun.

The Petitioner was convicted of the crime of murder on August 23, 1976 before the Honorable John T. Gentry. The present attorney for the Petitioner did not represent the Petitioner during the jury trial on August 23, 1976, but did represent the Petitioner incident to the appeal from such conviction.

By opinion filed October 11, 1977 the South Carolina Supreme Court reversed such murder conviction and ordered a new trial. That new trial was held some thirty-six days later on November 16, 1977, again before the Honorable John T. Gentry.

During trial on November 16, 1977 the trial judge made in excess of twenty comments which were insulting or ridiculing of the defendant or attorney for the defendant. At the conclusion of such trial, the Petitioner was convicted of the lesser included crime of manslaughter and sentenced to the maximum term of thirty years.

Immediately following the trial, a member of the jury commented to the defense attorney,

"I guess that you are happy." When asked what was meant by that comment, the juror stated, "We did not find him guilty of murder like the judge wanted us to do."

On the morning following the trial, the defense attorney was requested to attend a high school classroom and explain to the class (all of whom had viewed the entire trial) "why Judge Gentry tried so hard to assure that the defendant would be convicted?"

On appeal to the South Carolina Supreme Court, neither the Transcript of Record, the Appellant's Brief nor the Respondent's Brief raised the issue of whether any Objection was raised during trial concerning such comments by the trial judge. However, the South Carolina Supreme Court raised such issue on its own motion and ruled "If asserted errors are not presented to the lower court, the question cannot be raised for the first time on appeal." Thus the South Carolina Supreme Court did not even consider such issue in its deliberations.

The Petitioner made a timely motion for a rehearing and requested that the Petitioner be allowed to set forth the reasons that such objections were not raised during the trial. However, the South Carolina Supreme Court denied such motion for a rehearing. Thus the Petitioner was never allowed to ex-

plain either the effect of such judicial comments or the failure to raise such issue at the trial level.

On appeal and in the motion for a rehearing the Petitioner set forth the constitutional provisions of the constitution upon which this Petition is based.

REASONS FOR GRANTING THE WRIT

Understanding that the Supreme Court of the United States is not able to entertain all Petitions for Certiorari presented, not withstanding the innocence of the Petitioner or the equities of the individual cases themselves, this Writ or section of this writ is divided into two portions. The first will discuss the nationwide effect of the grant of the Petition, and the second will discuss the equities of this individual case.

In order to avoid appeals and the new trials that follow, appellant courts have developed the rule that requires that in order to raise an issue on appeal, that issue must have been raised during the prior trial. One of the major reasons that raising issues at a prior stage would help to avoid appeals and the new trials that follow is that if the lower court is made aware or alerted of an error, it can correct the error during trial and thus avoid the appellant reversal and

subsequent new trial.

However, an exception to such rule in most jurisdictions allows such error be raised for the first time on appeal where such error is of such a character as did deprive the defendant of a fair trial and fundamental rights. United Brotherhood, C.J. v United States, 330 US 395, 91 L ed 973, 67 S CT 775; Re Adoption of a minor, 94 App DC 131, 214 F 2d 844, 47 ALR 2d 813; Bennett v State, 127 Fla 759, 173 So 817; People v Burson, 11 Ill 2d 360, 143 NE 2d 239; State v Crooker, 123 Me 310. 122 A 865; 33 ALR 821; Pine Grove Nevada Gold Min. Co. v Freeman, 63 Nev 357, 171 P2d 366; People v Jung Hing, 212 NY 393, 106 NE 105; State v Moore, 194 Or 232, 241 P2d 455.

And this rule is especially observed in criminal cases. United States v Atkinson, 297 US 157, 80 L ed 555, 56 S Ct 391. For as stated in Commonwealth v Wadley, 169 Pa Super 490, 83 A 2d 417, no one should be deprived of his liberty because of the carelessness of his counsel in failing to call attention of the trial judge to palpable error which offends against the fundamentals of a fair and impartial trial.

However some states have refused to recognize this exception to the requirement of raising issues at the trial stage in order to

use such as a basis for appeal. Such was the case in State v Braley, 224 Or 1, 355 P 2d 467. Also apparently following State v Braley is the instant appeal of the State v Leonard M. Posey, Jr.

Therefore there appears to be a conflict between the federal courts on one side allowing this exception to the requirement of objections at the trial stage and on the other side some states rigidly requiring all objections to be raised at the trial stage.

But to further influence the United States Supreme Court to grant this writ, the Petitioner would call to the attention of the court that this case did not just involve errors not recognized by the trial judge, but rather comments being made by the trial judge himself. It would be one matter to require that errors be called to the attention of the trial judge so that he can correct the error. But when the trial judge is himself making such comments, what benefit would it do to request him to refrain from such comments?

This defendant was placed in a very precarious position. One choice would be to object to such comments and further anger the trial judge. The risk undertaken by that course of action would be that the trial judge could make a curative charge in a scartistic tone of voice that would "Correct"

the objection to the satisfaction of the appellant court. For the appellant court would have before it only a transcript of the words spoken during such charge, and not a voice transcript, showing the tone of voice during such charge or the expressions on the faces of the jury during such charge.

Another risk that the defendant would undertake by such objection would be that such would further anger the trial judge and assure the maximum sentence in the event that the defendant was found guilty. (This is the sentence handed down in this case.)

The other choice would be to just say nothing concerning such comments and to try not to make an issue before the jury. By such action, the defendant would just hope that by letting such comments pass as unnoticed as possible, the jury would also just ignore such comments. This last choice was the option chosen in the instant case. But obviously the jury did not just ignore and disregard such judicial comments.

Perhaps this petitioner would have been better served had objection been raised to such comments, and the failure to object might have been the wrong choice. However, the only other choice was to risk a sarcastic"curative" charge that would correct nothing but would give the appellant court

reason to rule that "any prejudice existing was cured by the curative charge given." The other risk undertaken by such objection would be that such objection would further anger the trial judge.

To require a defendant on trial for the crime of murder to make such a choice with no correct choice available is depriving such defendant of liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Therefore this Petitioner prays that the Supreme Court grant this writ and rule that in a criminal case involving errors that deprive the defendant of a fair trial and fundamental fairness, the requirement of trial stage objections be stricken, or at least in the alternative, that such requirement be stricken when the error being committed involves improper comments by the trial judge himself.

CONCLUSION

The within case is one involving issues of great importance to the courts of the United States and the various states. For this court has not yet reviewed a state court ruling that would require a defendant to risk either to further anger a judge perturbed by a prior reversal or to waive

the right to appeal from more than twenty insulting comments by that judge during trial.

For the reasons stated, this Petitioner would pray that this writ be granted and that the conviction of the Petitioner be reversed.

RESPECTFULLY SUBMITTED,

Kenneth E. Sowell

Kenneth E. Sowell
500 Pettigru Street
Greenville, S.C.
29601
Telephone 803-242-4171
Attorney for the Petitioner

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE
RESPONDENT

v.

LEONARD M. POSEY, JR.
APPELLANT

APPEAL FROM GREENVILLE COUNTY
JOHN T. GENTRY, SPECIAL JUDGE

MEMORANDUM OPINION NO. 78-123
FILED SEPTEMBER 5, 1978

AFFIRMED

Kenneth E. Sowell, of Greenville, for Appellant

Attorney General Daniel R. McLeod, and Assistant Attorneys General Brian P. Gibbes and Robert N. Wells, Jr., all of Columbia; and Solicitor William W. Wilkins, Jr., of Greenville, for Respondent

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PER CURIAM: Appellant was convicted of murder in August, 1976. On appeal his conviction was reversed and the case was remanded for a new trial. State v. Posey, 269 S.C. 500, 238 S.E. 2d 176 (1977). In the second trial, he was convicted of the lesser included offense of manslaughter and was sentenced to thirty (30) years imprisonment. He appeals

from this conviction.

Appellant argues that the trial judge made a number of improper comments during the course of the trial; however, the record does not show that appellant ever raised this issue below. If asserted errors are not presented to the lower court, the question cannot be raised for the first time on appeal. State v. Holland, 261 S.C. 488, 201 S.E. 2d 118 (1973). Thus this issue is not before us for our consideration.

After a full consideration of the remaining issued raised by appellant, we are of the opinion that no error of law appears and that these issues are governed by well settled principles of law. Accordingly, they are dismissed under Rule 23 of the Rules of Practice of this Court.

AFFIRMED

THE SUPREME COURT OF SOUTH CAROLINA

October 2, 1978

Kenneth E. Sowell, Esquire
318 East Coffee Street
Greenville, South Carolina, 29601

Re: The State v. Leonard Posey, Jr.

Dear Mr. Sowell:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition Denied"

The remittitur is being sent down today.

Very truly yours,

Francis H. Smith
Clerk